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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CR. 17-00609 VC
	)	
JOSE INEZ GARCIA-ZARATE,	)	
	)	
Defendant.	)	
	)	

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San Francisco, California  
Thursday, August 23, 2018

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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**BY: HALLIE MITCHELL HOFFMAN  
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**BY: J. TONY SERRA**

Also Present: Wendy Maestracci, Spanish-Language Interpreter

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

1 Thursday - August 23, 2018

10:09 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Case Number 17-CR-00609, USA  
5 versus Jose Inez Garcia-Zarate. Counsel, please state your  
6 appearances for the Record.

7 **MS. LEE:** Shiao Lee, on behalf of the United States.  
8 Good morning, Your Honor.

9 **THE COURT:** Good morning.

10 **MR. SERRA:** Good morning, Your Honor. It's  
11 Tony Serra, on behalf of Mr. Zarate. He's present. He's in  
12 court. He's being assisted by a Spanish-language interpreter.

13 **THE COURT:** Good morning. Good morning, Mr. Zarate.

14 **MR. SERRA:** Judge, my hat (indicating) -- I think I  
15 mentioned I had the cancer procedure, so I'm healing.

16 **THE COURT:** No problem.

17 **MR. SERRA:** Thank you. Hard to imagine you without  
18 it, actually.

19 **INTERPRETER:** Good morning, Your Honor. Certified  
20 Spanish interpreter Wendy Maestracci, previously sworn in.

21 **THE COURT:** Good morning.

22 Okay. So you got my Order. You know why I wanted to have  
23 you in for a discussion. What do you all think we should do?

24 **MS. LEE:** The Government's position is to move  
25 forward with trial on October 1.

1 I did have a very brief discussion with Mr. Serra when we  
2 were sitting here a few minutes ago, and he indicated to me  
3 that his position is for us to wait until the Supreme Court  
4 makes a decision.

5 I indicated that that could be quite some time, assuming  
6 oral arguments are December. This is all assuming. And  
7 potentially a decision wouldn't be handed down for half a year  
8 thereafter. It could be almost a year of -- of a wait time.

9 And so the Government's position is we move forward to  
10 trial, and that a grant of cert. doesn't change the binding  
11 precedent on this particular area of law.

12 **THE COURT:** Well, it's certainly true that the grant  
13 of cert. doesn't change the binding precedent; but, as a  
14 practical matter, the binding precedent may change. And so if  
15 the trial goes forward in early October, and if there is a  
16 conviction, it seems quite possible that the conviction would  
17 be overturned as a result of a new Supreme Court decision on  
18 the dual-sovereign issue -- right? -- or separate-sovereign  
19 issue, or whatever the doctrine is called.

20 So if the -- I mean, after all, the defendant is in  
21 custody. Right? And if the defendant, despite the fact that  
22 he is in custody, prefers to hold the trial over until the  
23 Supreme Court makes its decision, what is wrong with that?

24 **MS. LEE:** Well, I guess the first thing would be that  
25 it's not just the defendant that has a statutory right to a

1 Speedy Trial, but also the public and the Government. And I  
2 think Your Honor would have to find that this delay outweighs  
3 the best interests of the public and the defendant in the  
4 Speedy Trial. And, as you know --

5 **THE COURT:** Well, I mean, the best interests of --

6 I agree with you that the public has a right --

7 **MS. LEE:** Okay.

8 **THE COURT:** -- but if the defendant wants to remain  
9 in custody here in the Alameda County Jail, I guess, as opposed  
10 to wherever he would be if he was convicted in October, after  
11 that trial, and as long as he's in custody, and if the  
12 defendant wants to put over the trial, then the question is:  
13 Is it in the best interests of the public to go forward with  
14 this trial, where the conviction may well be overturned as a  
15 result of an upcoming Supreme Court decision, as opposed to  
16 leaving the defendant in custody while we await the  
17 Supreme Court decision?

18 And so what's your argument for why it's in the best  
19 interests of the public to go forward with the trial?

20 **MS. LEE:** I would say that the Government bears the  
21 burden of proof in every criminal case, and that the Government  
22 presents evidence. And over time evidence, going to trial,  
23 could become stale. Many of the witnesses are civilian  
24 witnesses, where it's based off of their memory of the  
25 incident. And, granted, it's really been quite some time since

1 the incident; since July 1st of 2015; but delaying it further,  
2 I would argue, has the potential -- the possibility -- to  
3 prejudice the Government's ability to meet its burden of proof.

4 **THE COURT:** Could you give me an example of, like, an  
5 actual, fact-based example of how that could happen?

6 **MS. LEE:** You know, I can't give you a tangible  
7 example; meaning, for instance, I've spoken to so-and-so, and  
8 they've told me they won't remember in a year. That, I cannot  
9 give; but I can just give you the general possibilities that in  
10 most instances, people's memories will fade over time.

11 **THE COURT:** Well, what's a hypothetical example of  
12 something that somebody might not remember?

13 **MS. LEE:** Potentially a witness who saw  
14 Mr. Garcia-Zarate on the pier would testify to what he or she  
15 recollects was his demeanor; what he was doing; what made them  
16 notice him to begin with before the shooting.

17 **THE COURT:** What would his demeanor have to do with  
18 the trial that we are scheduled to have? I mean, the  
19 Government has charged him with being an alien in possession of  
20 a firearm, and being a felon in possession of a firearm. What  
21 does his demeanor have to do with anything?

22 **MS. LEE:** It's less important in this -- in this type  
23 of charge, as opposed to what was charged in the State, for  
24 sure.

25 **THE COURT:** We're not concerned with what was charged

1 in the State.

2 **MS. LEE:** Right.

3 **THE COURT:** We're concerned with what is going to be  
4 the subject of the trial here in Federal Court. Right?

5 **MS. LEE:** Yes. Correct. Absolutely.

6 **THE COURT:** Okay.

7 **MS. LEE:** But I'm just thinking, for instance, well,  
8 what the Government would have to prove is knowing  
9 possession -- right? -- that he possessed the gun knowingly,  
10 without accident, mistake, or ignorance.

11 And so where he was seated, what he was doing, how he  
12 behaved after the shooting; a witness seeing, you know, the  
13 "plop" of a gun in the water, getting thrown over the -- not  
14 the throwing aspect, but just something falling into the  
15 water -- these are all, I think, relevant facts to show knowing  
16 possession of a firearm.

17 And I'm not saying that necessarily they wouldn't remember  
18 in a year. That's not what I'm purporting to the Court, but  
19 just simply --

20 **THE COURT:** Well, we know that it would be less than  
21 a year. Right? We know the Supreme Court decision will come  
22 down sometime before the end of June.

23 **MS. LEE:** Right, so -- but even then, I guess that  
24 would be -- how many months? It could potentially be nine or  
25 ten months. So I think all the Government's position is simply

1 that --

2           **THE COURT:** Well, the trial would be in October.

3           **MS. LEE:** Right.

4           **THE COURT:** And, best guess, Supreme Court decision  
5 comes down in April, let's say, for a case argued in December.  
6 So from October to April, we're talking about a roughly  
7 six-month delay. Right?

8           **MS. LEE:** Right. And I will just state for the  
9 Record, Your Honor, that I hear what you're saying. It's just  
10 the Government's position is simply that, you know, we'd like  
11 to move forward October 1st. We think that there is a public  
12 interest and an interest of the Government to move forward in a  
13 timely manner.

14           **THE COURT:** And what is that? Can you put it --

15           You mentioned the possibility that somebody might not  
16 remember something. What's the other public interest in moving  
17 forward? Is there anything else?

18           **MS. LEE:** I mean, I think that's the main thing. And  
19 -- I think that's the main thing.

20           **THE COURT:** Okay.

21           **MS. LEE:** But I think also it's that figuring out how  
22 the Supreme Court is going to rule is a little bit like reading  
23 tea leaves; like they may come down and say, *You know what?*  
24 *This has worked for 150 years. The dual sovereignty exists as*  
25 *it should.* They may do something different.

1 And so changing the course of how the Government brings  
2 cases to trials and moves things along the docket, to wait for  
3 a Supreme Court decision, in terms of -- I think it might  
4 result in changing practice at the Federal District Court  
5 level, of having to kind of wait. So there are a lot of things  
6 that Supreme Courts decide on very important topics. And if we  
7 start thinking, *Well, we don't know how they're going to*  
8 *decide. It might be, you know, eight months, nine months, six*  
9 *month later*, I don't think it should affect --

10 **THE COURT:** In Federal Court we stay cases all of the  
11 time, based on a Supreme Court decision to hear a case. I  
12 mean, when the Supreme Court grants cert. in a case that's  
13 going to be relevant to cases going on in the Federal  
14 District Court, we frequently stay those cases.

15 I mean, most recently, the case involving arbitration, and  
16 whether arbitration provisions for employees violated their  
17 right to collectively bargain -- when the Court granted cert.  
18 in that case, District Courts all over the country stayed cases  
19 that presented that issue, awaiting the Supreme Court decision.

20 I mean, that's -- so I guess your argument that it would  
21 upset how practice is in District Courts -- I guess I don't  
22 understand that. I mean, it seems consistent with typical  
23 practice in District Courts to potentially to stay a case like  
24 this, pending the Supreme Court decision.

25 **MS. LEE:** Okay. I think in a case like this, given



1 the -- given the existing binding precedent has virtually been  
2 black-letter law for more than a century, I think moving  
3 forward, given that that law as it currently stands has not  
4 changed, is what the Government would recommend, knowing that  
5 also the defendant has remedies, should, let's say, in April,  
6 May, June, the Supreme Court comes down and says whatever they  
7 say about dual sovereignty no longer being an exception. I  
8 don't know. I don't know what they would possibly say, but --  
9 and I can't guess -- but the defendant would have the options  
10 to file a direct appeal. The defendant would have the option  
11 to file a 28 United States Code 2255 motion. He has remedies.

12 And so I would just simply say -- just to submit that we  
13 would like to proceed forward.

14 **THE COURT:** Okay. Mr. Serra.

15 **MR. SERRA:** Your Honor, I think you've anticipated  
16 most of the rationale that I would have presented with respect  
17 to requesting that this matter be continued for trial at a date  
18 reasonably subsequent to Supreme Court ruling.

19 Let me just say three things quickly.

20 Firstly, we're very optimistic. You see, why would the  
21 Supreme Court take the case, unless there were at least a  
22 number of them seriously considering overthrowing, you know,  
23 the dual-sovereign doctrine? And it's ripe to be overthrown,  
24 but I won't go into that issue. So we're optimistic.

25 Two. The prosecution speculates. You know,

1 November 23rd, briefing will be finished. My God. Maybe we'll  
2 get a ruling in 60 days, and it won't be April, May, or June.  
3 She's speculating.

4 Thirdly, the only glimmer of public interest is that, Oh,  
5 the witnesses, with passage of time, which will only be six  
6 months, may forget or -- I don't know -- not remember some of  
7 the detail; but this case is somewhat unique in the sense that  
8 there's statements and there's testimony from the prospective  
9 witnesses which they can be shown to refresh their  
10 recollection.

11 So from my perspective, there's no public interest in  
12 having my client, you know, go in April, let's just say, versus  
13 October 1.

14 See, we can do it this way. And I don't -- it's a waste  
15 of time. I can make a motion before you; dismissal on double  
16 jeopardy. You would deny it. Then I would go to the  
17 Ninth Circuit. They would stay it.

18 And why put me to, you know, a needless procedure?

19 I think that, you know, all of the criteria here fit into  
20 a situation where we should postpone this trial until after the  
21 Supreme Court rules, Your Honor.

22 **THE COURT:** Of course, the consequence of that is  
23 that your -- your client will be in custody until --

24 **MR. SERRA:** Well, if he goes down, he's going to get  
25 ten years. He's going to get a heck of a lot more than waiting

1 six more months.

2           **THE COURT:** Okay. Okay. I will give it a little bit  
3 more thought, and issue a written ruling very shortly.

4           **MR. SERRA:** Thank you, Your Honor.

5           **MS. LEE:** Thank you, Your Honor.

6           **THE COURT:** Thank you.

7           (At 10:23 a.m. the proceedings were adjourned.)

8 I certify that the foregoing is a correct transcript from the  
9 record of proceedings in the above-entitled matter.

10

11 

12 \_\_\_\_\_ August 29, 2018

13 Signature of Court Reporter/Transcriber      Date

14 Lydia Zinn

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